



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

COMMERCIAL AND TAX DIVISION

HCCC NO. E188 OF 2019

DIANA MAISIE OSANO ODERO T/A

ODERO & ASSOCIATES ADVOCATES.....PLAINTIFF

-VERSUS-

DAWID ABDULRAHMAN AND SAAD MIGDAD T/A

ABUDULRAHMAN SAAD & COMPANY ADVOCATES.....1ST DEFENDANT

FIVE STAR CONSTRUCTION COMPANY LIMITED.....2ND DEFENDANT

JUDGMENT

Introduction.

1. Through the originating summons (OS) dated 13th June 2019, the plaintiff/respondent herein sued the defendants seeking the following orders; -

1. That an account be taken and the defendants be ordered to pay the amount still outstanding in the sale transaction of Land Reference Number 36/111/215 Eastleigh, Nairobi and interests thereon at a rate of 15.5% per annum from 19th February 2018 until payment in full in terms of the 1st defendant's professional undertaking given to the plaintiff.

2. That the 2nd defendant be restrained from charging, transferring, mortgaging and or dealing with the property in any manner whatsoever pending the hearing and determination of these summons.

3. Any other relief as the court may deem just and fair to award as the circumstances of the case shall demand.

2. A summary of the plaintiff's case is that he acted for a vendor (**Willie Mahungi Ndambi**) in the sale agreement executed on 19th February 2018 in respect of LR No. 36/111/215 Eastleigh wherein the 1st defendant acted for the purchaser, the 2nd defendant herein.

3. The plaintiff states that it was agreed that the purchase price would be Kshs 45 million out of which a 10% deposit of Kshs 4.5 million was paid on 15th February 2018 and that the balance was to be paid within 90 days.

4. According to the plaintiff, the transfer was completed on 7th March 2018 and vacant possession granted to the purchaser on 12th September 2018 but that the 1st defendant reneged on its undertaking to release the balance of the purchase price notwithstanding the fact that the plaintiff had complied with all the conditions of the sale thereby precipitating the filing of the Originating Summons.

5. The respondents entered appearance to the Originating Summons even though default judgment was erroneously entered against them on 15th July 2019 which judgment was set aside through the ruling delivered on 29th April 2020 with a rider that the defendants were to file their defence within 7 days from the date of the said ruling.

6. The defendant did not however file any defence within the given timelines, or at all, thus prompting the plaintiff to once again request for default judgement on 17th June 2020. Default judgment was thereafter entered against the defendants after which the matter was listed for formal proof on 25th June 2020.

Formal proof.

7. The formal proof was conducted virtually, via Microsoft Teams. The plaintiff testified that she is an advocate of the High Court of Kenya Practicing at the law firm of Odera & Associates advocates. She stated that the 1st defendant acted as the advocate for the 2nd defendant who was interested in purchasing the plaintiff's client's property being LR No. 36/111/215 valued at Kshs 45 million. She further stated that she prepared the sale agreement which was signed on 19th February 2018 after which the 2nd defendant paid 10% of the purchase price on the understanding that the balance of Kshs 40.5 million would be paid within 90 days.

8. She testified that the transfer of the purchased property was effected/completed on 7th May 2018 after which she wrote to the defendants to pay the balance of the purchase.

9. The plaintiff's case is that the defendants have to date not settled the balance of the purchase price despite the fact that they were granted vacant possession on 12th September 2018.

10. The plaintiff's claim is for the balance of the purchase price of Kshs 40.5 million and interest at 10% till payment in full according to the terms of the sale agreement and an order to restrain the defendants from dealing in the said purchased property. The plaintiff also sought damages.

11. She produced the documents attached to the affidavit in support of the originating Summons which documents included:

- a) Sale agreement (annexure DMO-1)
- b) Search certificate of the suit property confirming registration of the 2nd defendant as the registered owner of the suit property (annexure DMO-5).
- c) Demand letters (annexure DMO 13-14).

12. I have considered the Originating Summons filed herein together with the supporting affidavit and annexures. I have also considered the oral evidence presented by the plaintiff during formal proof.

13. I am satisfied that the plaintiff has proved her case against the defendants jointly and severally. I therefore find that the plaintiff entitled to the orders sought in the Originating Summons.

14. I note that Clause 3.1 of the sale agreement stipulates as follows:

“Default

i. If any sum payable by the purchasers hereunder is not paid on due, date, the purchasers shall (without prejudice to the exercise by the Vendor of any other rights or remedies in his favour) pay to him 10% interest on the balance of the purchase price per month (and including) the due date for payment of such sum (together with all accrued interest) in full.”

15. Clause 1.1.2. of the said sale agreement on the other hand stipulates that the balance of the purchase price of Kshs 40.5 million was to be paid on completion and that the purchasers were to pay interest at 10% per month on the balance till payment in full.

16. This court takes cognizance of the fact parties to an agreement are bound by the terms of their agreement. (See *National Bank of Kenya Ltd v Pipe Plastic Samkolit (K) Ltd and Another (2002) EA 503*).

17. The instant case, this court has no option but to enforce the terms of the agreement between the parties herein. Consequently, I allow the plaintiff's case and enter judgment against the defendant's jointly and severally as follows: -

a. Payment of the sum of Kshs 40.5. million being the outstanding balance of the purchase price together with interest at 10% per month till payment in full.

b. An order of injunction to restrain the 2nd defendant from charging, transferring, mortgaging and/or dealing in any manner whatsoever until the defendants comply with prayer No. (9) hereinabove.

c. I award the costs of the case to the plaintiff.

Dated, signed and delivered via Microsoft Teams at Nairobi this 15th day of October 2020 in view of the declaration of measures restricting court operations due to Covid -19 pandemic and in light of the directions issued by his Lordship, the Chief Justice on the 17th April 2020.

W. A. OKWANY

JUDGE

In the presence of:

Mr. Mohamed for the defendant.

Mr. Odero for the plaintiff.

Court Assistant: Sylvia